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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

FEB 24 2004

File: WAC 02 025 57255 Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

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Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a producer of pharmaceutical health and beauty aids and food grade chemicals. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The employer named on that Form ETA 750 labor certification, however, is not the petitioner on the immigrant visa petition (Form I-140). The director determined that the petitioner had not established that it is the successor-in-interest to the employer named on the certified application for alien employment certification (Form ETA 750).

On appeal, counsel submits a statement.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The Department of Labor issues a Form ETA 750 labor certification to a potential employer/petitioner on behalf of a potential employee/beneficiary. Under certain circumstances, a beneficiary may be substituted on the Form ETA 750. A new petitioner, however, may not be substituted on the labor certification or visa petition. A petition may be approved if the petitioner is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and how the change in ownership occurred. It must show that it continues to operate the same type of business as the original employer. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

The employer named on the approved Form ETA 750 in this case is Alliance Consumer Int. LLC. The petitioner on the Form I-140 petition is Aaron Industries, Inc. With the petition counsel submitted an undated letter requesting that the petition be processed pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). This request is addressed below.

Because the record contained no evidence to demonstrate that the petitioner is the successor-in-interest to the employer identified on the Form ETA 750, the California Service Center, on February 10, 2002, requested additional evidence. Specifically, the Service Center requested evidence of the type of change of ownership, buyout, merger, etc., and evidence that the petitioner assumed all rights, duties, obligations, and assets of the original employer.

Counsel submitted a response to the Request for Evidence. That response contained evidence pertinent to other issues raised in the request, but no response pertinent to whether the petitioner is the successor-in-interest of the original employer. The director determined that the evidence submitted did not establish that the petitioner is the original employer's successor-in-interest and, on June 14, 2002, denied the petition.

On appeal, counsel stated,

The Petitioner is proceeding pursuant to AC21. The Reviewing officer erred in ignoring the petitioner's writter (sic) request.

Pursuant to the provisions of AC21, the employer need not be a sucessor (sic) in interest.

AC21 permits a beneficiary of an approved employment-based immigrant visa petition with a pending adjustment of status to legal permanent residence application (Form I-485) to change jobs under certain circumstances. An otherwise approvable I-485 is no longer necessarily deniable merely because the beneficiary changed jobs during its pendency.¹

In this case, no adjustment of status application for lawful permanent resident on Form I-485 is pending. Only an immigrant visa petition on Form I-140 is pending. Counsel has pointed to no provision of AC21 that permits the beneficiary of a pending immigrant visa petition on Form I-140 to substitute an unrelated petitioner for the original employer to whom the approved labor certification was issued. Although counsel purports to cite AC21 in support of the position that this petition is approvable, counsel has not shown that AC21 supports that position. Counsel has also failed to provide evidence that the petitioner in this

¹ For example, the petition for an individual whose application for adjustment of status pursuant to section 245 of the Immigration and Nationality Act (the Act) has been filed and remains unadjudicated for 180 days or more shall remain valid with respect to a new offer of employment if the individual changes employment or employers if the new job is in the same or a similar occupational classification as the job for which the immigrant visa petition was filed.

matter is the successor-in-interest to the original employer. Counsel has failed, therefore, to demonstrate that the petition may be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.